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No. 08-73

FILED

AUG 18 2008

OFFICE OF THE CLERK
SUPREME COURT, U.S.

In the

Supreme Court of the United States

CONNIE C. RESHARD,

Petitioner,

v.

MAIN LINE HOSPITALS INCORPORATED d.b.a./a.k.a., MAIN LINE HEALTH AND THE LANKENAU HOSPITAL, DR. MICHAEL J. GLASNER, DR. JOHN F. SCHILLING, MARK E. SCOTT, D.O., DR. KIMBERLY M. LENHARDT, DR. THOMAS J. MEYER, PULMONOLOGY ASSOCIATES, INC., AND DR. GEOFFREY P. TREMBLAY,

Respondents.

On Petition for Writ of Certiorari to the United States Court of Appeals for the Third Circuit

BRIEF IN OPPOSITION

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August 18, 2008

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COUNTER STATEMENT OF QUESTIONS PRESENTED

A. Whether the Court appropriately dismissed the medical malpractice action for failure to prosecute where the plaintiff failed to conduct any meaningful discovery and thereafter failed to communicate with the Court or counsel for a 2 ½ year period?

Suggested Answer: Yes

B. Whether plaintiff, a pro se litigant, who is also an attorney, was granted deference by the Court in the handling of her case?

Suggested Answer: Yes

C. Whether the trial court appropriately applied its discretion in denying plaintiff's motions for default judgment?

Suggested Answer: Yes

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COUNTER STATEMENT OF CASE

A. Facts Regarding Medical Treatment

Connie Reshard, a fifty-two (52) year old female, presented to Lankenau Hospital on April 4, 2000 for vaginal myomectomy procedure due to a diagnosis of prolapsing uterine fibroid. Her past medical history was significant for abdominal myomectomy at age thirty-four (34) for uterine fibroids and she required blood transfusions at that time.

On February 23, 2000 the plaintiff had a biopsy and refused hysterectomy. On April 4, 2000 vaginal myomectomy and uterine packing was performed to remove a prolapsing fibroid. Uterine artery embolization was done April 4, 2000.

The plaintiff did well until April 8, 2000 when she developed difficulty breathing and chest pain. The appellee, Geoffrey Tremblay, M.D., a cardiologist, was consulted on April 9, 2000. He examined the plaintiff and diagnosed probable pulmonary embolism and recommended Heparin therapy, CT scan, chest x-ray, telemetry monitoring and consultation with the pulmonary service. CT scan performed on April 9, 2000 confirmed bilateral pulmonary embolism and a Greenfield catheter was placed. Dr. Tremblay had no further contact with the plaintiff. She responded to treatment and was discharged to home on April 18, 2000.

The defendant has no information regarding plaintiff's previous or follow up medical care because

the plaintiff has objected to production of her prior and subsequent medical records.

B. Counter Statement of Procedural History

Plaintiff filed this medical malpractice action in April 2002. Appendix ("A") at 8. On January 24, 2003, the Court held a hearing and ordered that plaintiff's deposition occur by February 28, 2003. A at 24-25. The deposition was scheduled for February 27, 2003, but canceled by Ms. Reshard on that date due to an alleged illness. On March 6, 2003, the Court ordered plaintiff's deposition to take place by March 31, 2003 and it was scheduled for that date after agreement by all parties. Plaintiff's brief argues she was denied the right to counsel, which is incorrect. The March 27, 2003 Order denied her request to be represented by counsel who was not admitted in the Eastern District of Pennsylvania. A at 23-24. The Court ordered:

> Upon consideration of Plaintiff's Emergency Motion Requesting Clarification and Authorization for Use of Counsel at Plaintiff's Deposition (Doc. No. 107), it is hereby **ORDERED** that the Motion is **DENIED**.
>
> It is further **ORDERED** that no counsel, who has not been admitted to practice before this Court pursuant to Rule 83.5 of the Local Rules of Civil Procedure for the United States District Court for the Eastern District of Pennsylvania, shall take part in any way in the deposition of Plaintiff, Connie C. Reshard, or any other deposition in this action.

Plaintiff then filed a motion on March 31, 2003, after her deposition was scheduled to begin, requesting that Hughie Hunt, Esquire be admitted *pro hac vice* to represent her at the deposition. The Court did not rule on the motion in time for her deposition because it had not yet been filed. Supplemental Appendix ("SA") at 1.

For whatever reason, plaintiff never chose counsel who was admitted in the jurisdiction where she filed suit to represent her. Further, plaintiff did not even file a motion for representation until March 25, 2003, five (5) days before her rescheduled deposition.

Plaintiff filed two (2) motions and a Writ of Mandamus to have the Honorable Robert Kelly disqualified from the case. A at 9. Judge Kelly denied the first motion. A at 9. The second motion he denied on April 16, 2003, but voluntarily recused himself because he found plaintiff's "fixation on [his] alleged bias, her personal attacks on [his] presence in this action are hindering, rather than facilitating, the conclusion of this case." A at 9.

Plaintiff was treated fairly by the Court throughout the litigation and denial of some motions does not indicate a lack of deference to a pro se plaintiff.

ARGUMENT

INTRODUCTION

The Petition for Writ of Certiorari fails to present any "compelling reasons" or "substantial question" which would warrant review of this matter by the United States Supreme Court. S. Ct. R. 10.

The issues raised by plaintiff amount to a review on the merits involving allegations of erroneous factual findings or misapplicaton of a rule of law by the Court. As such, these issues are important only to the litigants and lack public importance. S. Ct. R. 10. Accordingly, the Petition for Writ of Certiorari should be denied.

A. Dismissal for Lack of Prosecution was the Appropriate Sanction

The plaintiff filed this medical malpractice lawsuit against numerous health care providers by filing a Complaint on April 2, 2002. A at 8. Volumes of discovery motions ensued. A at 9. Plaintiff filed three (3) interlocutory appeals with the Third Circuit, all of which were dismissed for lack of jurisdiction. A at 8, 9, 10. All appeals were terminated by December 17, 2004, when applications for rehearing were denied. A at 14. Plaintiff took no steps whatsoever to advance her claims after that date. Accordingly, on April 28, 2006, her claim was dismissed, sua sponte, for lack of prosecution. A at 8.

A federal trial court may dismiss a plaintiff's action with prejudice for failure to prosecute. Link v. Wabash Railroad Co. 370 U.S. 626 at 629, 82 S. Ct. 1386, 8 L.Ed. 2d 734 (1962). That remedy prevents undue delays in pending litigation and avoids congestion on the court dockets. Id. at 630. Federal Rule of Civil Procedure 41(b) permits the court to dismiss an action for failure of the plaintiff to prosecute the claim. That rule outlines the procedure whereby a defendant can move for dismissal of the claim. However, F.R.C.P. 41(b) does not require that the defendant file a motion

to dismiss. Link, supra, at 630. Rather, the court, can dismiss a lawsuit sua sponte, "acting on its own initiative, to clear their calendars of cases that have remained dormant because of the inaction or dilatoriness of the parties seeking relief." Id. The courts must have that power to manage their own affairs and to achieve the orderly and expeditious disposition of cases. Id. at 631. See Chambers v. Nasco, Inc., 501 US 32, 111 S. Ct. 2123; 115 L.Ed. 2d 27; 1991 U.S. LEXIS 3318.

To determine whether dismissal is an appropriate sanction for failure to prosecute, the court must usually consider several factors:

> (1) the extent of the party's personal responsibility; (2) the prejudice to the adversary caused by the failure to meet scheduling orders and respond to discovery; (3) a history of dilatoriness; (4) whether the conduct of the party or the attorney was willful or in bad faith; (5) the effectiveness of sanctions other than dismissal, which entails an analysis of alternative sanctions; and (6) the meritoriousness of the claim or defense.

Poulis v. State Farm Fire and Casualty Co., 747 F.2d 863, 868 (3d. Cir. 1984). Not all of the Poulis factors need to be satisfied to allow for dismissal, but rather a balancing test is used. Smith v. Altegra Credit Co., No. 02-CV-8221, 2004 U.S. Dist. LEXIS 21478, at 12 (E.D. Pa. Sept. 22, 2004). Further, "when a litigant's conduct makes the adjudication of the case impossible, such balancing under Poulis is unnecessary." Scbrell

v. Phila. Police Dept., 159 Fed. Appx. 371, 374 (3d Cir. 2005).

The trial court found that the first five (5) factors were met and that the sixth could not be determined because of the plaintiff's own conduct. A at 16. Plaintiff repeatedly failed to comply with court orders, attend conferences, respond to discovery, or even attend her own court ordered deposition. A at 14-16. She filed multiple, frivolous motions and appeals, whose only purpose could be delaying tactics. A at 14-16. The final interlocutory appeal was dismissed and rehearing was denied on December 17, 2004. A at 14. The silence from plaintiff thereafter was deafening. She did not make any effort whatsoever for the next year and a half, until Judge Surrick finally dismissed her lawsuit for lack of prosecution in April 2006. A at 8. She did not call or write to counsel or the Court at any time after the November 26, 2003 conference. She took no steps to produce a certificate of merit, to conduct discovery or to comply with discovery requests served on her during that time. During the four (4) years that this lawsuit was pending in the trial court, plaintiff failed to supply an expert report to support her claims of medical malpractice. There was no remedy, other than dismissal.

This lawsuit began with plaintiff filing an inordinate number of motions. Ultimately, after about one year of litigation, plaintiff moved for the recusal of the Honorable Robert Kelly due to alleged bias. A at 9. Judge Kelly ultimately denied two (2) motions for his recusal, but then voluntarily withdrew from the case because he could no longer be helpful due to plaintiff's perception of bias. A at 9. Judge Surrick

took over the case on April 22, 2003. Judge Surrick began his tenure by denying all seventeen (17) outstanding motions and scheduling a conference so the case could get a fresh start, away from its stalled beginning. A at 9. On November 26, 2003, Judge Surrick held a pretrial conference with plaintiff and all counsel present. A at 19-21. Judge Surrick issued an order compelling both sides to participate in discovery. A at 19-21. Plaintiff refused to participate in discovery and failed to provide any meaningful rationale for her blatant disregard of the Court's Order.

Plaintiff has argued that she did not have a complete copy of the Lankenau Hospital chart. Judge Surrick ordered on November 26, 2003, that Lankenau make "all of its original records" available for inspection by December 9, 2003. A at 19-21. Plaintiff failed to appear for the inspection, and at the time, failed to advise counsel that she would not appear, or to provide any reason therefor. Plaintiff sets forth a lengthy argument in her brief that she was not permitted to conduct electronic discovery. However, plaintiff never attempted to conduct electronic discovery. She never advised counsel or the Court what steps electronic discovery entailed and she never provided a necessary time frame for electronic discovery. Plaintiff asserts in her brief she has an extensive background in electronic discovery, but provides no evidence in this case of any steps taken to accomplish electronic discovery. This issue appears to be nothing more than a red herring. Rather than trying to comply with Court Orders, plaintiff repeatedly ceased communication with the Court and counsel whenever she disagreed with the Orders.

Plaintiff also failed to participate in her court ordered deposition. She alleges she was hospitalized for complications arising out of the medical malpractice by the appellees, during the first time the deposition was scheduled. However, plaintiff refuses to authorize release of her medical records, so this assertion cannot be confirmed. The deposition was rescheduled for March 31, 2003. All counsel appeared for the deposition. Plaintiff appeared, placed a statement on the record, and then left without giving testimony.

Accordingly, plaintiff stalled the litigation for four (4) years, until the court appropriately determined that dismissal was the appropriate sanction. The Court applied the Poulis, supra, factors and dismissed plaintiff's lawsuit with prejudice.

B. Deference to Pro Se Plaintiff

The plaintiff was accorded deference throughout the litigation, but she was not permitted to violate the rules of the Court. Plaintiff is an attorney, licensed to practice within the Commonwealth of Pennsylvania and the United States District Court for the Eastern District of Pennsylvania, where this case is venued.

Plaintiff raises the issue that she sought to have counsel enter *pro hac vice* to represent her at her deposition and that motion was denied. The denial of that motion had nothing to do with plaintiff being an attorney. First, plaintiff brought suit in April 2002. Her deposition was initially scheduled for February 27, 2003. Plaintiff claims she canceled the deposition on February 26, 2003 due to illness. Plaintiff never

moved prior to February 27, 2003 to have counsel at her deposition. Plaintiff's deposition was next scheduled for March 31, 2003 and plaintiff agreed to the date. Plaintiff first filed a motion to be represented by counsel at her deposition on March 25, 2003, six (6) days before the deposition was scheduled. On March 27, 2003, the Court denied the motion because plaintiff failed to identify a specific attorney in the motion.

The Court ordered:

> Upon consideration of Plaintiff's Emergency Motion Requesting Clarification and Authorization for Use of Counsel at Plaintiff's Deposition (Doc. No. 107), it is hereby **ORDERED** that the Motion is **DENIED**.
>
> It is further **ORDERED** that no counsel, who has not been admitted to practice before this Court pursuant to Rule 83.5 of the Local Rules of Civil Procedure for the United States District Court for the Eastern District of Pennsylvania, shall take part in any way in the deposition of Plaintiff, Connie C. Reshard, or any other deposition in this action.

A at 23-24.

Plaintiff then filed a motion on March 31, 2003, after her deposition was scheduled to begin, requesting that Hughie Hunt, Esquire be admitted *pro hac vice* to represent her at the deposition. The Court did not rule on the motion in time for her deposition because it had not yet been filed. A at 1.

Plaintiff was treated fairly by the Court throughout the litigation and denial of some motions does not indicate a lack of deference to a pro se plaintiff or any party.

C. The Trial Court Appropriately Denied Plaintiff's Motions for Default Judgment

The plaintiff's Motions for Default Judgment which were filed because of late answers to the Complaint were appropriately denied and the issue is not a compelling issue warranting review by the United States Supreme Court. District Courts have "discretionary authority to determine the appropriate sanction for a particular case and to impose severe sanctions in cases it deems appropriate." Tecmarine Lines, Inc., supra; quoting Coastal Mart Inc. v. Johnson Auto Repair, Inc., 196 F.R.D. 30, 34 (E.D. Pa. 2000) (citing National Hockey League v. Metro. Hockey Club, Inc., 427 U.S. 639, 49 L.Ed. 2d 747, 96 S.Ct. 2778 (1976). Three factors apply in determining whether default judgment is appropriate based on the defendant's late answer. Chamberlain v. Giampapa, 210 F.3d 154, 2000 U.S. App. LEXIS 5187 (3d Cir. 2000), citing United States v. $55,518.85 in U.S. Currency, 728 F. 2d 192, 195 (3d Cir. 1984). Those three factors include "(1) prejudice to the plaintiff if default is denied, (2) whether the defendant appears to have a litigable defense, and (3) whether defendant's delay is due to culpable conduct." Id.

The Chamberlain case involved a medical malpractice claim and the Court found the plaintiff was not prejudiced by the denial of default judgment. Id. The Third Circuit has held that prejudice to the

plaintiff does not occur simply because the plaintiff must litigate the merits of the claim. Tecmarine Lines, Inc., supra; citing Feliciano v. Reliant Tooling Co., Ltd., 691 F.2d 653, 656-657 (3d Cir. 1982). Rather, prejudice occurs when the plaintiff's ability to pursue the claim is hampered through loss of evidence or increased fraud potential. Id. Also, the defendant's Answer in Chamberlain, supra, did allege a complete defense to the allegations in the Complaint. Id. The defendant does not need to prove the merit of the defense, but rather, need only offer a defense, which, if successful at trial, would completely bar the action. Tecmarine Lines, Inc. v. CSX Intermodal, Inc., 2001 U.S. Dist. LEXIS 12398 (U.S.D.C. E.D. Pa. 2001); citing International Brotherhood of Electrical Workers, Local Union 313 v. Skaggs, 130 F.R.D. 526, 529 (D. Del. 1990). Finally, the Court noted there was no evidence to suggest "that the defendant's delay in filing an answer was due to culpable conduct, which in the Third Circuit is conduct that is 'taken willfully or in bad faith.'" Chamberlain, supra; quoting Gross v. Stereo Component Sys., Inc., 700 F.2d 120, 124 (3d Cir. 1991).

In the instant case, the default judgment was appropriately denied. The plaintiff was not prejudiced in any way by the denial of the default judgment. She has been forced to litigate her medical malpractice claim on the merits. Through no fault of the defendants, she has been unable to make out a prima facie case of negligence. The defendants have all asserted complete defenses to the lawsuit. Finally, there is no evidence that the defendants acted with culpable conduct, i.e., the conduct was not willful or in bad faith.

D. Conclusion

Ms. Reshard has not cited any "compelling reasons" or "substantial question" for granting a Writ of Certiorari. Sup. Ct. R. 10. She has raised issues which are of importance only to the litigants themselves. Further, the trial court appropriately dismissed the action for lack of prosecution and the Third Circuit agreed. For all the foregoing reasons, Geoffrey Tremblay, M.D. respectfully requests this Honorable Court deny plaintiff's Petition for Writ of Certiorari.

Respectfully submitted,

YOUNG & McGILVERY, P.C.

BY:

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Dated: August 18, 2008

APPENDIX

APPENDIX 1

IN THE UNITED STATES DISTRICT COURT FOR THE EASTERN DISTRICT OF PENNSYLVANIA

No. 02-1787

[Filed April 16, 2003]

CONNIE C. RESHARD, Plaintiff,	)
v.	)
MAIN LINE HOSPITAL, INC. d/b/a THE LANKENAU HOSPITAL a.k.a MAIN LINE HEALTH, et al., Defendants.	)

ORDER

AND NOW, this 16th day of April, 2003, upon consideration of Plaintiff's Motion for Reconsideration of the Motion to Disqualify Senior Judge Robert F. Kelly, it is hereby ORDERED that:

1. The Motion (Doc. No. 119) is DENIED and

2. Plaintiff's Motion to Disqualify Senior Judge Robert F. Kelly Under 28 USC § 144 and 28 USC § 455 (Doc. No. 122) is DENIED as moot.

IT IS FURTHER ORDERED that, based upon the reasons set forth in the Memorandum Opinion, I voluntarily RECUSE myself from this action.

BY THE COURT:

/s/
Robert F. Kelly, Sr. J.

APPENDIX 2

IN THE UNITED STATES DISTRICT COURT FOR THE EASTERN DISTRICT OF PENNSYLVANIA

No. 02-1787

[Filed April 16, 2003]

CONNIE C. RESHARD, Plaintiff,	)
v.	)
MAIN LINE HOSPITAL, INC. d/b/a THE LANKENAU HOSPITAL a.k.a MAIN LINE HEALTH, et al., Defendants.	)

MEMORANDUM

ROBERT F. KELLY, Sr. J.

Presently before this Court is the Motion for Reconsideration to Disqualify Senior Judge Robert F. Kelly Under 28 USC § 144 and 28 USC § 455 and Points and Authorities. (Doc. No. 119). This *pro se* personal injury action is based upon alleged medical malpractice by the following Defendants: Main Line Hospitals, Inc., d/b/a and a/k/a Main Line Health and

The Lankenau Hospital and its employees, Dr. Kimberly Lenhardt; Dr. Michael Glassner; Dr. Thomas Meyer; Dr. Mark Scott; Dr. John Schilling and Dr. Geoffrey Tremblay.[1] The instant action was filed on April 2, 2002. For the past year, the Court has attempted to conduct this action as efficiently as possible. The Court's efforts have resulted in numerous hearings, telephone conferences, motions and orders, requiring the Court's attention on a daily basis. The culmination of the Court's substantial efforts has resulted in, among other things, the filing of three motions by Plaintiff seeking my disqualification from the action, a Writ of Mandamus and an appeal.[2] For the reasons that follow, the Motion will be denied.[3]

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[1] The Court has jurisdiction over this action based upon diversity. See 28 U.S.C.A. § 1322.

[2] Plaintiff's first Motion to Disqualify Senior Judge Robert F. Kelly was denied by an Order dated March 28, 2003. (Doc. No. 116). Plaintiff filed her Motion for Reconsideration of my denial of her Motion for Disqualification on March 31, 2003. (Doc. No. 119). Also, on March 31, 2003, Plaintiff filed an identical Motion to Disqualify Senior Judge Robert F. Kelly Under 28 USC § 144 and 28 USC § 455. (Doc. No. 122). All three motions are materially identical to one another.

[3] As an initial matter, the issue of jurisdiction must be addressed. Review of the Docket in this matter shows that Plaintiff filed the instant Motion for Reconsideration to Disqualify Senior Judge Robert F. Kelly on March 31, 2003. (Doc. No. 119). Additionally, on March 31, 2003, Plaintiff filed a Notice of Appeal. (Doc. No. 120). Thus, Plaintiff filed her Motion for Reconsideration and Notice of Appeal on the same day. "It is well established that '[t]he filing of a notice of appeal . . . confers jurisdiction on the

I. STANDARD

A motion for reconsideration is appropriate only where: (1) there has been an intervening change in controlling law; (2) new evidence is available; or (3) there is need to correct a clear error of law or prevent

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court of appeals and divests the district court of its control over those aspects of the case involved in the appeal.'" Sheet Metal Workers' Intern. Ass'n Local 19 v. Herre Bros., Inc., 198 F.3d 391, 394 (3d Cir. 1999)(citing Griggs v. Provident Consumer Discount Co., 459 U.S. 56, 58 (1982))(footnote omitted). Plaintiff's Notice of Appeal states that she is appealing "the Order entered in this action on the 27th day of March 2003, and certain other collateral orders on the 27th and 28th days of March 2003." (Doc. No. 120). Plaintiff's Notice of Appeal is unclear about whether she is appealing the Court's March 28, 2003 Order denying her Motion for Disqualification. However, the Court retains jurisdiction whether or not Plaintiff has appealed the Court's March 28, 2003 Order. In the case where Plaintiff's appeal includes the Court's Order regarding disqualification, Plaintiff's Motion for Reconsideration allows for this Court to retain jurisdiction. Where any motion for reconsideration is filed prior to the filing of a notice of appeal, "jurisdiction remains in this Court until all Motions for Reconsideration are decided." Greene v. London Harness & Cable, No. 99-3807, 2001 WL 359838, at *1 (E.D. Pa. Apr. 3, 2001); see also Vaidya v. Xerox Corp., No. 97-547, 1997 WL 732464, at *2 (E.D. Pa. Nov. 25, 1997); Fed. R. App. P. 4(a)("A notice of appeal filed . . . before deposition of any of the above motions is ineffective to appeal from the judgment or order, or part thereof, specified in the notice of appeal until the entry of the order disposing of the last such motion outstanding.). In the case where Plaintiff's appeal does not include the Court's March 28, 2003 Order denying Plaintiff's Motion for Disqualification, the Court has jurisdiction over the instant motion because the motion involves aspects of the case that are not involved in the appeal.

manifest injustice. N. River Ins. Co. v. Cigna Reinsurance Co., 52 F.3d 1194, 1218 (3d Cir. 1995). However, such motions should only be granted sparingly. Armstrong v. Reisman, No. 99-4188, 2000 WL 288243, at *2 (E.D. Pa. Mar. 7, 2000).

II. DISCUSSION

a. Recusal Under 28 U.S.C. §§ 144 and 455

Plaintiff requests my disqualification pursuant to sections 144 and 455 of Title 28 of the United States Code. Section 144 provides:

> Whenever a party to any proceeding in a district court makes and files a timely and sufficient affidavit that the judge before whom the matter is pending has a personal bias or prejudice either against him or in favor of any adverse party, such judge shall proceed no further therein, but another judge shall be assigned to hear such proceeding.
>
> The affidavit shall state the facts and the reasons for the belief that bias or prejudice exists, and shall be filed not less than ten days before the beginning of the term at which the proceeding is to be heard, or good cause shall be shown for failure to file it within such time. A party may file only one such affidavit in any case. It shall be accompanied by a certificate of counsel of record stating that it is made in good faith.

28 U.S.C. § 144. As a initial matter, "[a] judge is not automatically required to recuse himself or herself upon the filing of a motion under [Section] 144." Schreiber v. Kellogg, 838 F. Supp. 998, 1003 (E.D. Pa. 1993). "He or she must first pass on the legal and factual sufficiency of the motion and ascertain whether the facts alleged fairly support a charge of bias." Id. (citing Mims v. Shapp, 541 F.2d 415 (3d Cir. 1976)). Thus, [i]t is the duty of a judge against whom a [S]ection 144 affidavit is filed to pass upon the legal sufficiency of the facts alleged." United States v. Enigwe, 155 F. Supp.2d 365, 369 (E.D. Pa. 2001)(quoting United States v. Townsend, 478 F.2d 1072, (3d Cir. 1973))(quotation marks and citation omitted). "The mere filing of an affidavit, however, does not automatically disqualify a judge." Id. (citing Townsend, 478 F.2d at 1073). "Disqualification results only from the filing of a timely and sufficient affidavit." Id. (quoting Townsend, 478 F.2d at 1073)(quotation marks omitted).

"In evaluating a motion brought under [Section] 144, the 'test is whether, assuming the truth of the facts alleged, a reasonable person would conclude that a personal as distinguished from a judicial bias exists.'", Id. (quoting Mims, 541 F.2d at 417). "As a rule, only allegations of personal bias and prejudice will suffice and the bias or prejudice must stem from an extrajudicial source."[4] Id. (citations omitted).

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[4] A "rarely invoked" exception to the requirement that bias must stem from an extrajudicial source "requires disqualification when a judge displays 'pervasive bias' towards [the party seeking recusal] regardless of the source of the bias." United States v

"Extrajudicial bias is 'bias not derived from the evidence or conduct of the parties that the judge observes in the course of the proceedings.'" Schreiber, 838 F. Supp. At 1003 (quoting Johnson v. Trueblood, 629 F.2d 287, 291 (3d Cir. 1980), cert. denied, 450 U.S. 999 (1981))(citations omitted). When examining the allegations, "[n]either the truth of the allegations nor the good faith of the pleader may be questioned, regardless of the judge's personal knowledge to the contrary." Enigwe, 155 F. Supp.2d at 370 (quoting Mins, 541 F.2d at 417)(quotations marks and citation omitted).

Section 455, provides, in pertinent part:

(a) Any justice, judge, or magistrate of the United States shall disqualify himself in any proceeding in which his impartiality might reasonably be questioned.

(b) He shall also disqualify himself in the following circumstances:

(1) Where he has a personal bias or prejudice concerning a party, or personal knowledge of disputed evidentiary facts concerning the proceeding.

Rosenberg, 806 F.2d 1169, 1174 (3d Cir. 1986), cert. denied, 481 U.S. 1070 (1987). Upon examination of Plaintiff's allegations, the Court does not believe the allegations prove any bias against Plaintiff, much less the pervasive bias necessary to invoke the pervasive bias exception. Thus, the Court's actions do not provide a basis for the operation of the pervasive bias exception.

28 U.S.C. § 455. Under Section 455, "[t]he applicable inquiry is whether a reasonable [person] knowing all the circumstances would harbor doubts concerning the judge's impartiality." United Staes v. Vespe, 868 F.2d 1328, 1341 (3d Cir. 1989)(citations omitted); see also United States v. Dalfonso, 707 F.2d 757, 760 (3d Cir. 1983). "This rule is limited by the 'extrajudicial source' doctrine, which warrants a judge's disqualification where the source of the partiality lies in knowledge gained outside the course of judicial proceedings. Viola v. United States, No. 99-586, 2003 WL 147779, at *1 (E.D. Pa. Jan. 21, 2003)(citing Liteky v. United States, 510 U.S. 540, 554-56 (1994)).

b. Plaintiff's Motion[5]

In her motion for disqualification, Plaintiff alleges that the record displays a pattern of partiality against her and in favor of Defendants. In support of Plaintiff's claims, she asserts various instances which

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[5] Both Plaintiff's Motion for Reconsideration and her original Motion to Disqualify do not contain an affidavit, but include a "Verification in Lieu of an Affidavit." (See Doc. Nos. 109 and 119). Plaintiff's "Verification" does not appear to be either witnessed or notarized. (Id.). In both motions, Plaintiff's verification states that her attached motion is asserted in good faith and contains information which demonstrates Judge Kelly's bias in favor of Defendants (Id.). Therefore, instead of a separate affidavit, Plaintiff relies upon the allegations and conclusions contained within her motions to support her argument. (Id.). As a result of Plaintiff's election not to attach a separate affidavit, the Court considers the allegations asserted in Plaintiff's motions to support her claims of bias as if they have been alleged within a separate affidavit.

allegedly show partiality. The instances upon which Plaintiff relies are the following allegedly biased rulings made by the Court pertaining to numerous discovery issues; a March 6, 2003 telephone conference, where Judge Kelly allegedly advised Defendant Michael Glassner to file a Motion for Sanctions regarding the Plaintiff's deposition scheduled for February 27, 2003; an allegation that Judge Kelly scheduled a telephone conference in this case on February 26, 2003 at 4:30 p.m., after Plaintiff had called the Judge's chambers that morning and left a voice message that she was having a medical emergency; and an allegation that Judge Kelly's prior rulings regarding Plaintiff's use of counsel has improperly denied assistance of counsel to Plaintiff. (See Pl.'s Mot. To Disqualify Senior Judge Robert F. Kelly Under 28 USC § 144 and 28 USC § 455; Pl.'s Mot. For Reconsideration; Pl.'s Mot. To Disqualify Senior Judge Robert F. Kelly Under 28 USC § 144 and 28 USC § 455).

The Court finds that the allegations in support of Plaintiff's motion calling for my disqualification are insufficient to support her claims of bias. Mindful of the rule that the allegations contained in Plaintiff's motion must be accepted as true, the Court finds that Plaintiff's allegations are insufficient as a matter of law. Assuming Plaintiff's allegations are true, there are no statements or allegations based upon personal, or extrajudicial bias. Thus, Plaintiff fails to offer any facts or allegations that the Court harbors personal or extrajudicial bias against her. Plaintiff's allegations relate to prior rulings and actions taken by the Court in the course of its participation in this case. In addition, Plaintiff's motion contains conclusory

allegations and opinions which need not be accepted as true. Consequently, the Court finds that no reasonable person, knowing all the circumstances, would harbor doubts concerning the Court's impartiality. As a result of Plaintiff's failure to allege sufficient facts to prove that the Court has a personal bias or prejudice against her, I properly denied Plaintiff's original motion seeking my disqualification on March 28, 2003. Plaintiff's instant Motion for Reconsideration is based upon the ground that my denial was improper. Since I properly denied Plaintiff's motion based upon the legal insufficiency of her allegations, Plaintiff's Motion for Reconsideration is denied.

c. Voluntary Recusal

Although I stand behind my denial of Plaintiff's motion for my disqualification, and vehemently oppose any allegations of prejudice or bias, I conclude that recusal of myself from this action is necessary. In view of Plaintiff's irrational fixation on my alleged bias, her personal attacks on my presence in this action are hindering, rather than facilitating, the conclusion of this case. As an illustration of the aforementioned, Plaintiff has filed three motions seeking my disqualification from the action. (See Doc. Nos. 109, 119 and 122). The motions include allegations against me from the beginning stages of the case until the present time. In support of her argument seeking my disqualification, Plaintiff focuses upon virtually all my actions and decisions, especially my decisions pertaining to discovery. Plaintiff's various motions and issues regarding her disagreement with my decisions has aided in rendering this action over one

year old with the filing of over 120 documents and motions. Additionally Plaintiff has filed a Writ of Mandamus and a separate appeal concerning decisions that I made regarding discovery and the assistance of counsel. As a result, Plaintiff's numerous issues with my decisions not only involves this Court, but has expanded to include the involvement of the Court of Appeals for the Third Circuit.

In this action, I have tried my best to move the case along as efficiently and expeditiously as possible. Even with my best efforts, Plaintiff has not engaged in any meaningful discovery despite the fact that discovery is scheduled to conclude on April 30, 2003. It appears that Plaintiff has mistakenly interpreted my efforts to efficiently advance this litigation as some sort of prejudice or bias against her. My efforts in advancing this action are not based upon prejudice or bias, but are premised upon judicial economy, saving the parties valuable time and expense, and in the interest of allowing this action to come to a just conclusion. At this stage of the case, in light of Plaintiff's recent filings, it appears that Plaintiff is now shifting her litigation and disdain towards the Court. An example of this shifting of priorities can be found in many recent filings by Plaintiff which include personal allegations against me and my management of the case.

As a result of the aforementioned, it is clear to me that my involvement in this action has turned into an impediment. Currently, the case is at a virtual standstill due to the present motions for my disqualification, the two existing appellate motions and Plaintiff's Emergency Motion for Stay Pending

Appeal and Writ of Mandamus. Thus, in an attempt to move this action forward, I conclude that my voluntary removal is necessary. As a result, in the interest of judicial economy, I hereby voluntarily recuse myself from this action.

III. CONCLUSION

For all the foregoing reasons, Plaintiff's Motion for Reconsideration is denied. The Court's March 28, 2003 denial of Plaintiff's Motion to Disqualify Senior Judge Robert F. Kelly is appropriate because Plaintiff's Motion is legally insufficient. Since Plaintiff has not presented an intervening change in controlling law or newly available evidence, and in the absence of a need to correct a clear error or prevent manifest injustice, the Court denies Plaintiff's Motion for Reconsideration. Although Plaintiff's Motion for Reconsideration is denied, I voluntarily recuse myself from the action. I deny any claims of prejudice or bias, however, I find that my recusal is necessary for the reasons enumerated above.

ADDENDUM[6]

The Court recognizes that it is unnecessary to explain any of the allegations made by Plaintiff in her motion. However, in an attempt to set the record straight and make this opinion complete, the Court will attempt to clarify some of the allegations made by Plaintiff. By clarifying some of Plaintiff's allegations, the Court is able to show that there has not been any bias or prejudice against Plaintiff in favor of Defendants.

Plaintiff's declaration that I advised Defendant Michael Glassner to file a motion for sanctions during a March 6, 2003 telephone conference is inaccurate. On March 6, 2003, the Court held a telephone conference regarding discovery and the scheduling of depositions. Towards the conclusion of the telephone conference, counsel for Defendant Dr. Michael Glassner stated that he was considering filing a motion for sanctions against Plaintiff for her failure to appear at her deposition. Counsel asked me if I would like to address the issue during the telephone conference or if I would prefer to address the issue in a motion. I stated that if counsel was planning on

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[6] In various motions throughout this case, Plaintiff has included her version of events pertaining to the Court's actions. As a result, Plaintiff's version of events regarding the Court's actions has been repeatedly asserted and maintained without correction. The Court uses this Addendum as a means of clarifying and setting the record straight regarding what actually occurred. The Court, however, notes that its decision denying Plaintiff's Motions for Disqualification and Reconsideration are not based upon what is set forth in the Addendum.

filing a motion then it would be better to file a motion rather than raise the issue over the phone.

By offering an accurate account of events and, more importantly, placing them properly within context, it is evident that Plaintiff has proffered a distorted rendition of what really occurred. By presenting what was said out of context, Plaintiff has made an innocent and impartial exchange between myself and Dr. Glassner's counsel out to be an improper and prejudicial instruction to counsel to file a motion for sanctions against Plaintiff. The true and accurate account of what occurred shows that Plaintiff's use of this instance as an example of impartiality is without merit.

As for Plaintiff's allegation that I scheduled a telephone conference in this case on February 26, 2003 at 4:30 p.m. after she left a voice message in the morning stating that she was having a medical emergency, it is false. Prior to February 26, 2003, upon a request by defense counsel, the Court scheduled a 4:30 p.m. telephone conference for Wednesday, February 26, 2003. Before scheduling the telephone conference, the Court inquired of the availability of all counsel, including Plaintiff. Upon receiving a convenient date for all involved, the Court scheduled the conference call for 4:30 p.m. on February 26, 2003. Before business hours on February 26, 2003, at approximately 8:30 a.m., Plaintiff left a voice message with my chambers stating that she was having a medical emergency and to give her a call back. The Court notes that Plaintiff's message stated only that she was having a medical emergency and to call her back and did not state anything else. At

approximately 8:45 a.m., my law clerk attempted to contact Plaintiff. Unable to personally speak with Plaintiff, my law clerk left a message on Plaintiff's voice mail instructing Plaintiff to get in touch with chambers. Throughout the day, mindful of the 4:30 p.m. telephone conference, my law clerk left several messages on Plaintiff's voice mail. At approximately 4:30 p.m.,. in a last attempt to salvage the telephone conference, my law clerk called Plaintiff and left a final message on Plaintiff's voice mail stating that the 4:30 p.m. telephone conference had been canceled due to Plaintiff's absence. The voice mail message also instructed Plaintiff to contact chambers in order to re-schedule the conference. Unable to reach Plaintiff, my law clerk then immediately called all relevant defense counsel and informed them that the telephone conference was canceled due to Plaintiff's medical emergency. My law clerk also instructed defense counsel that the telephone conference would be re-scheduled.

On Thursday, February 27, 2003, Plaintiff called chambers in the afternoon and spoke with my law clerk. Plaintiff explained to my clerk that she had been in the emergency room and was unable to telephone the Court. My law clerk told Plaintiff that the telephone conference would be re-scheduled upon the availability of Plaintiff and defense counsel. My law clerk learned of the availability of all involved, including Plaintiff, and re-scheduled the February 26, 2003 telephone conference for March 6, 2003 at 8:45 a.m. The re-scheduled telephone conference occurred on March 6, 2003 and included Plaintiff.

As evidenced by the true and accurate account of what occurred in relation to the February 26, 2003 telephone conference, Plaintiff's account of events is incomplete and patently untrue. The Court accommodated Plaintiff, without issue, by canceling the original telephone conference and re-scheduling it. At no time did the Court ever have a telephone conference regarding this action without the inclusion of Plaintiff. Plaintiff's contention otherwise is not a distortion of the facts, but is completely false.

Lastly, Plaintiff mistakenly alleges that I have improperly denied her the assistance of counsel. I have not improperly denied Plaintiff the assistance of counsel. Plaintiff, who is a licensed attorney in the Commonwealth of Pennsylvania, has represented herself since the inception of this action. Almost one year into the action, at the March 20, 2003 deposition of Dr. Lenhardt, Plaintiff attended the deposition with a man named Bashiru Jimod. Mr. Jimod, who apparently is an attorney, has never entered his appearance on behalf of Plaintiff as counsel of record. In addition, there has never been any motion for *pro hac vice* admission regarding Mr. Jimod. In fact, it was at Dr. Lenhardt's deposition where the Court and defense counsel first learned of Mr. Jimod's existence. At the deposition, defense counsel objected to Mr. Jimod's presence and, by telephone, I permitted Mr. Jimod to be present for the sole purpose of conferring with Plaintiff regarding the questions.

On March 25, 2003, six days before Plaintiff's scheduled deposition, Plaintiff filed an Emergency Motion Requesting Clarification and Authorization for Use of Counsel at Plaintiff's Deposition. (Doc. No.

107). This motion, as its name implies, was a motion requesting clarification and authorization by the Court for Plaintiff's use of counsel at her own deposition. The motion was neither an entry of appearance nor a *pro hac vice* motion. The motion was deficient in that it failed, among other things, to identify the attorney Plaintiff wished to have assist her and did not provide any information whatsoever about the undetermined attorney. On March 27, 2003, after considering Plaintiff's motion, I issued an order denying the motion. (Doc. No. 111). In an attempt to offer Plaintiff some guidance, and to help ensure the taking of Plaintiff's deposition on March 31, 2003, the Court's March 27, 2003 Order included the following language:

> It is further ORDERED that no counsel, who has not been admitted to practice before this Court pursuant to Rule 83.5 of the Local Rules of Civil Procedure for the United States District Court for the Eastern District of Pennsylvania, shall take art in any way in the deposition of Plaintiff, Connie C. Reshard, or any other deposition in this action. See Local R. Civ. P. 83.5; 83.5.2; Hearst/ABC-Viacome Entertainment Services v. Goodway Marketing, Inc., 145 F.R.D. 59, 63-64 (E.D. Pa. 1992).

(Doc. No. 111 (Court's March 27, 2003 Order)).

Thus, through this Order, I attempted to assist Plaintiff by providing the appropriate rules and relevant precedent regarding *pro hac vice* admission.

Apparently, on March 31, 2003, Plaintiff attended her deposition by herself. Plaintiff put a statement on

the record that she had filed a notice of appeal appealing my March 27, 2003 Order pertaining to Plaintiff's request for authorization to secure the assistance of associate counsel at her deposition. Plaintiff refused to continue her deposition fearful that she may suffer prejudice if she was made to continue with the deposition without the assistance of counsel. Also, on March 31, 2003, Plaintiff filed an application for Hughie Hunt, Esq. to appear *pro hac vice* pursuant to Rule 83.5.2(b) of the Local Rules of Civil Procedure for the United States District Court for the Eastern District of Pennsylvania. (Doc. No. 123). Prior to March 31, 2003, on Friday, March 28, 2003, at approximately 4:55 p.m., Plaintiff called my chambers and asked my law clerk if she had received Plaintiff's expedited *pro hac vice* motion which was filed that afternoon. My clerk informed Ms. Reshard that she had not seen the motion. The Court tried in vain to locate Plaintiff's *pro hac vice* motion prior to the commencement of her deposition at 10:00 a.m. on Monday, March 31, 2003 in order to ensure that nothing would delay the taking of Plaintiff's deposition. However, after viewing the application and the attached cashier's receipt, it appears that the Court was unable to locate Plaintiff's motion because it had not been filed until the afternoon of March 31, 2003.

As a result of the aforementioned, I did not, and never intended, to prevent Plaintiff from having the assistance of counsel. However, as an officer of the Court, I have required that Plaintiff appropriately comply with applicable rules of civil procedure, federal and local, pertaining to the assistance of outside counsel. Upon viewing an accurate account of what

happened in regard to Plaintiff's assistance of counsel claims, there is absolutely no bias or partiality to be found.